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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 28

JOE QUONG, JOE WING WAH and JOE WING FONG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Joe Quong, Joe Wing Wah, and Joe Wing Fong, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit entered on May 31, 1962.

OPINION FROM THE COURT BELOW

The United States Court of Appeals for the Sixth Circuit affirmed petitioners' conviction on May 31, 1962. The Opinion does not as yet appear in the reports. It is printed with this Petition as Appendix A.

JURISDICTIONAL STATEMENT

Your petitioners were found guilty in the United States District Court for the Western District of Tennessee and judgment was entered on the verdict on May 20, 1960. The United States Court of Appeals for the Sixth Circuit af-

firmed the conviction on May 31, 1962. The Petition for Rehearing was denied by that court on June 29, 1962. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

I.

Where, by Section 5 of the Trading with the Enemy Act, the Congress authorized the President or his designee to make criminally enforceable rules regulating "transactions involving any property in which any foreign country or a national thereof has any interest:"

A. Can an administrative rule validly be promulgated purporting to regulate transactions "with respect to any merchandise outside the United States", where such regulation purported to affect such transactions without regard to whether or not "any foreign country or a national thereof has any interest" in the merchandise?

B. Where the same statute imposes a severe criminal penalty for the breach of administrative rules "issued thereunder", is an administrative regulation which addresses itself to a set of objects other than those delineated by the Congress, such a regulation "issued thereunder", that a ten year sentence can be imposed for breach of the regulation?

C. Can the Congressional authority to issue regulations affecting goods in which a "foreign country or national thereof has any interest" be obviated by prohibiting unlicensed transactions in "all merchandise outside the United States" where the purpose of the regulation is to ban importation of Communist Chinese merchandise, but where it is admitted that the regulations cover goods all outside China in order to "keep really Chinese things out," by thus giving the Treasury Department an opportunity to

"pass on" particular transactions, the justification for such regulation being that it relieves the government of the burden of proving where goods actually came from?

II.

Do the words "Chinese-type drugs" have such definite meaning as will admit of a criminal prosecution for transactions therein, when the evidence of both parties discloses that there is no statutory, common law, administrative, commonly accepted or technical definition of the words, or any standard by which they can be defined; where the regulation containing the words provides no definition; and where the evidence of both the prosecution and defense discloses that the words "Chinese-type drugs" includes every animate and inanimate subject known to man, including but not limited to wheat, sugar, rice, onion, pumpkin, cherry, peach; where it further appears that Chinese-type drugs are merely those substances excluded from importation by a certain Federal Official, acting in the absence of any standards of any kind, and in pursuance of an "enforcement technique" which permits him to exclude such merchandise as to him falls within his private notion of the classification "Chinese-type drugs"?

Can an administrative regulation which prohibits all transactions outside the United States, be justified on the ground that it provides an easy "enforcement technique," where that "enforcement technique" consists in banning all unlicensed transactions in certain merchandise, in order that the Treasury Department may have an opportunity to "pass on" those transactions, thereafter allowing such of them as that department, acting without any standards whatever, sees fit to allow?

STATUTES AND REGULATIONS INVOLVED.

Title 50 Appendix, U.S.C.A., Section 5(b).

Title 31, Code of Federal Regulations, Chapter V, Section 500.204 (a)(2).

(Both set out in Appendix B, *infra*)

STATEMENT OF THE CASE.

* * *

Page references (App. Appx. ....) are to Appellants' Appendix, gray cover.

* * *

Petitioners Joe Quong and his two sons Joe Wing Wah and Joe Wing Fong were each charged in one or more substantive counts with having dealt in Chinese-type drugs outside the United States by transmitting drafts to persons or associations in Canada ". . . for the purchase and transportation of such Chinese-type drugs without such dealings being authorized by the Secretary of the Treasury . . ." in violation of the Trading With The Enemy Act, U.S.C.A. Title 50 Appx., Section 5(b), and Section 500.204, Chapter V, Title 31, Code of Federal Regulations, promulgated under said statute. (App. Appx. 17a-20a).

All petitioners were charged in each of five counts (App. Appx. 4a-17a) alleging that they conspired with defendants not on trial and others to violate the Trading with the Enemy Act by dealing in or importing ". . . Chinese-type drugs outside the United States . . ." without the authority of the Secretary of the Treasury, and to violate the general smuggling statute, 18 U.S.C.A. Section 545, by importing contrary to law and dealing in subsequent to such importation ". . . merchandise . . . a more particular description of said merchandise . . . being to the Grand Jurors unknown . . .".

Petitioners were convicted of all conspiracy charges (Counts 1-5) and Quong and Wah of each of the two substantive charges (Counts 6-9) naming him. Fong was acquitted as to the substantive charge against him.

The ten year sentences imposed upon Quong and Wah as to the substantive violations were made concurrent with the five year sentences imposed as to the conspiracies. Fong was sentenced to sentences aggregating 10 years on the conspiracy counts, reduced to five years as a result of the Court of Appeals reversal as to counts 2-5 on the ground that they merely duplicated count 1. In addition, Quong was fined $15,000, Wah and Fong $5,000, each.

In the trial of the case, the government sought to prove that petitioners Quong and Wah, operating from a store in Memphis, Tennessee, sent money to Canada in payment for and transportation of "Chinese-type drugs" which they would sell and transship to their customers. Petitioner Fong's supposed role was to transship some of the goods from Chicago to Memphis.

The government sought to make its proof by shipping and warehousing documents covering "dried vegetables" originating from sources in Vancouver, B.C., Canada. Succeeding documents of the same character describing similar goods suggested transshipment to points close to the border. Closely succeeding documents showed, without revealing Canadian origin, that warehousemen and shippers in Michigan, New York, and Minnesota, handled merchandise labelled "dried vegetables" whose consignee was Quong.

The government also sought to show that drafts from various of petitioners' bank accounts were sent to the supposed source of supply in Vancouver.

Purchasers of goods from Quong, and other witnesses, testified that some of such purchased goods were "Chinese-type drugs."

The jury was thus invited to infer that the items petitioners sold were items they had imported from Canada,

hence the items dealt with in Canada were "Chinese-type drugs." No proof was offered to show that any of the goods came from the orient.

In trial, one of petitioners' contentions was that the words "Chinese-type drugs" defied objective definition, entailed practically every commodity known to man, and by reason of their very generality, could not be the subject of a criminal prosecution.

According to the proof "Chinese-type drugs" include nearly every known animate and inanimate substance (App. Appx. 101a, 127a) including all such familiar household items as maize, wheat, sugar, rice, barley, oats, coconut, tulip, garlic, onion, potato, barberry, anise, nutmeg, mustard, cherry, peach, olive oil, carrots, sweet basil, mint, pumpkin, goldenrod, thistle, etc. (App. Appx. 102a).

Emanuel Minskoff, Chief of Enforcement, Foreign Assets Control, testified that he knew of no statute, rule or regulation defining the words. He said, "Chinese-type means Chinese-type" (App. Appx. 31a).

Other definitions offered by the government, the court, or the witnesses, included: something like "patent medicine" (App. Appx. 172a-173a), statements that the words included "medicine, herbs, tea and what have you"; that they were drugs used by persons of Chinese nationality; that the question must be considered from the standpoint of the Chinese (App. Appx. 99a); drugs "so considered by the public" (App. Appx. 100a); something one bought in a drugstore (App. Appx. 101a-102a); something imported under a Chinese name expressed in Chinese characters (App. Appx. 102a); goods consisting in other than what would satisfy Foreign Assets Control (App. Appx. 104a).

In touching upon the question of what did or did not constitute Chinese-type drugs, government witness Emanuel Minskoff testified that no licenses had been granted for any importation of Chinese-type drugs since the promulgation of regulations requiring their licensing since 1952 (App. Appx. 129a). Witness Ng identified dried cuttlefish as Chinese-type drugs, and identified an importation of those commodities by petitioner Quong subsequent to the regulation (App. Appx. 104a). Customs duties were paid to the United States on the importation of the cuttlefish and squid (App. Appx. 91a, 104a) which was seized by order of the Foreign Assets Control administration after its admission as violative of Section 500.204 of the Foreign Assets Control regulations, Title 31, Code of Federal Regulations (App. Appx. 93a-94a).

No proof was offered that any of the items introduced into evidence fit any definition including that given to the jury by the judge, *viz*, that the words referred to herbs and other natural products having a history of use in China and native to that country (App. Appx. 140a).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Where, by Section 5 of the Trading with the Enemy Act, the Congress authorized the President or his designee to make criminally enforceable rules regulating "transactions involving any property in which any foreign country or a national thereof has any interest":

A. Can an administrative rule validly be promulgated purporting to regulate transactions "with respect to any merchandise outside the United States", where such regulation purported to affect all such transactions without regard to whether or not "any foreign country or a national thereof has any interest" in the merchandise?

B. Where the same statute imposes a severe criminal penalty for the breach of administrative rules "issued thereunder", is an administrative regulation which addresses itself to a set of objects other than those delineated by the Congress, such a regulation "issued thereunder", that a ten year sentence can be imposed for breach of the regulation?

C. Can the Congressional authority to issue regulations affecting goods in which a "foreign country or national thereof has any interest" be obviated by prohibiting unlicensed transactions in "all merchandise outside the United States" where the purpose of the regulation is to ban importation of Communist Chinese merchandise, but where it is admitted that the regulations are designed to cover goods whether or not of Chinese origin in order to "keep really Chinese things out," by thus giving the Treasury Department an opportunity to "pass on" all transactions, the justification for such regulation being that it relieves the government of the burden of proving where the goods "actually came from?"

Petitioners were convicted for the breach of an administrative regulation, Title 31, Code Federal Regulations, Chapter 5, Section 500.204. The regulation was issued under the purported authority of the Trading with the Enemy Act, U. S. C. A. Title 50 Appendix, Section 5(b). The statute provides a criminal penalty (ten years imprisonment) for the breach of administrative rules "issued thereunder."

Petitioners contend that the reach of the statute vesting rule-making authority limited that authority to the power to make rules only as to the subject matter delineated by the authorizing statute. The regulation in question reaches a subject matter completely outside of the statutory limits. Such regulation, therefore, is not, with respect to the authorizing statute, "issued thereunder." Consequently the statutory criminal liability cannot properly be imposed for breach of the regulation. Section 5(b), Title 50, Appendix U. S. C. A., set out more fully at Appendix B, p. 17a, provides in relevant part that by rules and regulations issued by him or his designee, the President may ". . . prohibit . . . any dealings in or transactions involving, *any property in which any foreign country or a national thereof has any interest* . . ." (Emphasis supplied).

Section 5(b) (3) of the same section provides a criminal penalty for violation of ". . . any . . . regulation issued *thereunder* . . .". (Emphasis supplied).

Reading the provisions together, it would thus appear that Congress imposed criminal sanctions for violation of administrative regulations, only where those regulations address themselves to transactions "involving any property in which a foreign country or a national thereof has any interest."

But the Secretary of the Treasury as the President's designee, in issuing Section 500.204, Chapter V, Title 31, Code of Federal Regulations (Foreign Assets Control Regulations, Department of the Treasury) did not limit the regulation to "property in which any foreign country or a national thereof" had an interest. The regulation (set out more fully in Appendix B) whose alleged breach provoked the indictment here, provides in relevant part:

> "(a) Except as specifically authorized by the Secretary of the Treasury . . . no person subject to the jurisdiction of the United States may . . . engage in any transaction *with respect to any merchandise outside the United States* if such merchandise is:
>
> . . . .
>
> "Drugs, Chinese type" .(Emphasis supplied)
>
> . . . .

In short, the rule issued by the Secretary prohibits unlicensed transactions "with respect to any merchandise outside the United States" if the merchandise is "drugs, Chinese type" without regard to any foreign interest.

Obviously "any merchandise outside the United States" may differ radically from "any property in which any foreign country or a national thereof has an interest." For it is readily conceivable for property to exist outside of the United States without its being property in which a foreign government or national has any interest whatever.

By means of the statute, the Congress ". . . legislated and indicated its will, [giving] to those who were to act under such provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress. . . ." *United States* v. *Grimaud*, 220 U. S. 506, 517.

When the Secretary of the Treasury, acting under authority to prohibit only those transactions in property in which a foreign country or national had an interest, issued instead a rule prohibiting unlicensed dealings in any merchandise outside the United States which he cared to specify, he was doing considerably more than "filling up details."

The Court should observe that the particular merchandise here specified "drugs, Chinese type" are not the same as "drugs, Chinese origin," nor does either party to this litigation so contend. The regulation, and the indictment here, were directed against transactions in Chinese-type drugs which were merely *outside the United States*, regardless of country of origin or foreign interest. Moreover, as will be seen in a succeeding point, items described as "Chinese-type drugs" are indigenous to and are common articles of commerce of every country in the world.

The Court of Appeals held that the indictment was sufficient to advise the defendants that they were charged with dealing in goods in which foreign countries or nationals had an interest. The indictment did not so allege. It was worded in terms of the regulation, not the statute. But it was sufficient, said the Court, because although the indictment did not allege a foreign interest, the indictment cited the statute and the regulation (Opinion, Ptn., Appx. A, *infra*, p. 7a). But even if the validity of the regulation were assumed, the defendants were not put on notice that the *statute* had been violated. For the regulation simply does not require that dealings, to be illegal, must involve property in which a foreign country or national was interested.

Neither did the trial court's charge require proof of the element of a foreign interest (App. Appx. 142a, 143a). To

say that petitioners were advised that this was an element of the supposed offense is equivalent to saying that the indictment meant one thing to them, and something quite different to the trial judge, as evidenced by his charge.

Mr. Emanuel Minskoff is the Chief of Enforcement of the Foreign Assets Control of the United States Treasury Department (App. Appx. 26a). It appears that he is the man who determines "if something could be brought in": (App. Appx. 104a). If it cannot, he determines who shall be punished (App. Appx. 32a). According to the testimony, there are no standards by which one can determine what can be brought in, apart from Mr. Minskoff's determination (App. Appx. 31a, 104a).

Mr. Minskoff explained that the Secretary of the Treasury's broad view of the legislative enactment was part of an "enforcement technique". He explained that the object of the regulation was to prohibit intercourse with Communist China and that it was extremely burdensome:

> ". . . to prove that the particular goods actually did come from Communist China. It is of course difficult to prove where goods go from country to country, then come to the United States to show where they actually came from. To avoid any extra difficulty on the government's part, the regulations were amended to say any goods which were of Chinese type . . . would require a license. That would give the Treasury Department an opportunity to pass on it, say 'all right, so many Japanese items will come in from there; we will let them in.'
>
> "So after that, 500.204 was made law, no person in the United States or some foreigner could import or deal in any goods, even if they did not come from

China, but Chinese type, that enforcement technique.

". . . These [regulations] will take care of goods . . . if they were all completely outside China.

". . . this is a way of broadening the coverage as an enforcement technique to keep really Chinese things out . . . [even] if you can't prove it came from China . . . any importation without a license is prohibited and punishable." (App. Appx. 29a-30a).

But the "enforcement technique" extolled by Chief Enforcer Minskoff appears to be nothing more nor less than the flat assertion that proscription of transactions involving anything and everything might properly be promulgated by the Treasurer. The "enforcement technique", according to Minskoff, is simply to proscribe everything. Then the department is given, in the words of Mr. Minskoff, ". . . an opportunity to pass on it, and to say 'alright, we will let in certain goods.' "

The regulation can, at the whim of the Treasurer, amount to a flat proscription of all goods. For if logically equivalent words are substituted for "Chinese" in the expression "Chinese type" (*e.g.*, British type; European type, American type; Foreign type) without reference to any foreign interest in the goods, the Secretary can proscribe over as broad an area as he wishes. This would not be the case if a foreign interest were required to be shown. Such foreign interest can be inferred where a regulation proscribes in terms of "country of origin." *United States* v. *Broverman*, 180 F. Supp. 631, was cited by the Court of Appeals (Ptn. Appx. A, p. 8a) to the effect that a foreign interest need not be alleged. But *Broverman* involved an indictment alleging, and a regulation *addressed to*, a particular "country of origin". It does not apply to the quite different regulation involved in this case. It would be violative of the regulation allegedly breached in this case, for a United States citizen to sell "Chinese-type

drugs" in Mexico where the same had been grown, processed, and shipped from the United States. For petitioners were charged with transactions in goods "outside the United States". Thus Mr. Minskoff conceded it was criminal to eat chop suey in Canada (App. Appx. 31a-32a).

Using the "enforcement technique" applauded by Mr. Minskoff, the Treasury department not only has an opportunity to "pass on," matters by admitting or excluding merchandise. The Department also has an opportunity to "pass on" matters by calling for an indictment.

A more effective "enforcement technique" would be impossible to devise. Ultimate justice is assured by the down-to-earth, common-sense attitude of men like Mr. Minskoff. He testified, for example, that under the regulation an American needs a license to eat chop suey in Canada, but that such a license would readily be granted (Appellants' Appx. 31a-32a). Mr. Minskoff said that even a failure to obtain such a license before supper would be overlooked because prosecution is "discretionary with the Treasury Department" (Appellants' Appx. 32a).

With this attitude, it is not surprising that the record paints a clear picture of an administrative agency run amok. *E.G.*, dried squid and cuttlefish were considered by Foreign Assets Control to be "Chinese-type drugs" (App. Appx. 104a). The evidence showed that subsequent to the regulation, petitioner Quong had "lawfully imported" (whatever those words meant in the insane context of ensuing events) dried squid and cuttlefish from Hong Kong and that he had paid customs duties to the United States government (Appellants' Appx. 91a, 104a). Thereupon, Mr. Eli Slotkin, one of Mr. Minskoff's deputies, seized the "lawfully imported" dried squid and cuttlefish on which duties had been paid. It seems their im-

portation violated Section 500.204, 31 Code of Federal Regulations (App. Appx. 92a-93a, 123a). The very regulation whose breach was alleged in the indictment.

In short, one branch of the Treasury Department, the persons charged with collecting customs duties, passed upon the merchandise as proper, while another branch of the Treasury Department seized the same merchandise After the customs dutjes were paid. Customs agent Bruner testified that of course the government would not first let property into the country with taxes paid on it and then seize that same property (App. Appx. 91a). He apparently recked not the "enforcement techniques" employed by Mr. Minskoff.

It is unthinkable that a regulation should find its justification, not in the statute under whose authority it was promulgated, but in the fact that its terms provide an easy and convenient "enforcement technique". Your Honors are not necessarily required to pass upon propriety of the enforcement techniques used here. The Court need only observe that the regulation in question involved an exercise of power by the Secretary of the Treasury which the Congress did not authorize him to exercise under the Act. The invalidity of petitioners' conviction would appear to follow as a necessary consequence of the Secretary's lack of authority to issue the regulation.

* * *

Since one of the alleged objects (App. Appx. 6a) of the conspiracy count was to violate the regulation complained of the conspiracy count must also fall. The second object of the conspiracy (App. Appx. 5a) alleging importation of merchandise "contrary to law," without specifying what law was violated, is bad for two reasons. First, it fails to state the commission of an offense because it fails

to say what law petitioners conspired to violate. (*Keck* v. *United States*, 172 U.S. 434, 437; *Babb* v. *United States*, 218 F. 2d 538, 540). Further, it alleges unlawful importation of merchandise whose description was to the Grand Jurors unknown. A failure of proof ensued, since the only merchandise as to which there was any testimony, was the merchandise introduced in the trial. That merchandise was described by the Grand Jurors as "Chinese type drugs."

II.

Do the words "Chinese-type drugs" have such definite meaning as will admit of a criminal prosecution for transactions therein, when the evidence of both parties discloses that there is no statutory, common law, administrative, commonly accepted or technical definition of the words, or any standard by which they can be defined, and the regulation containing them provides no definition; where the evidence of both the prosecution and defense discloses that the words "Chinese-type drugs" include every animate and inanimate subject known to man, including but not limited to: wheat, sugar, rice, onion, pumpkin, cherry, peach; and where it further appears that "Chinese-type drugs" are merely those substances excluded from importation by a certain Federal Official acting in the absence of any standards of any kind pursuant to an "enforcement technique" which permits him to exclude such merchandise as to him falls within his private notion of the classification "Chinese-type drugs"?

Can an administrative regulation which prohibits all transactions in goods outside the United States be justified on the ground that it provides an easy "enforcement technique," where that "enforcement technique" consists in banning all unlicensed transactions in certain merchandise,

in order that the Treasury Department may have an opportunity to "pass on" those transactions, thereafter allowing such of them as that department, acting without any standards whatever, sees fit to allow?

• • •

". . . [A] statute which either prohibits or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391.

• • •

". . . no person . . . may . . . engage in any transaction with respect to any merchandise outside the United States if such merchandise is . . . Drugs, Chinese type . . ." (Title 31, Code of Federal Regulations, Chapter V, §500.204)

• • •

"We know of no published or commonly accepted definition of the term 'Chinese-type' drugs. If the term has any meaning, we presume that it refers to herbs and other natural products which have a history of use in China and which are native to that country. However, even this 'definition' may not be acceptable to others having an interest in such matters, and, further, it is a definition which is exceedingly broad.

"We point out that as a traditional matter, herbs have been the most widely used type of drug in China. However, in the last generation or two, China commenced to use modern preparations, including synthetic drugs, and so forth. In short, the treatment of disease in China has been affected by scientific developments in the rest of the world so that China commenced using modern medicine decades ago." (Government Exhibit 104; Statement by Food and Drug Division, United States Government. App. Appx. 103a)

• • •

"... [the regulation] does not define it; it states it ... Chinese type means Chinese type." (Government Witness Emanuel Minskoff, Chief of Enforcement, Foreign Assets Control, Treasury Department. App. Appx. 27a)

• • • •

The regulation under which this indictment was drawn bans transactions in "Chinese-type drugs" outside the United States. The words "Chinese-type drugs" are nowhere defined. They appear to have no common meaning. If they have any reasonably particularized meaning, it is yet to be suggested in the course of this litigation and has thus far successfully eluded the agency of the Government charged with enforcing the regulation.

The evidence ultimately revealed that Mr. Emanuel Minskoff, Chief of Enforcement of Foreign Assets Control, provided the standards by which merchandise was from time to time to be adjudged "Chinese-type drugs" (App. Appx. 104a) Witness Chu Fong Ng testified that in order to ascertain if something lay outside the realm of "Chinese type drugs" and could therefore be brought into the country one must find someone to satisfy, namely Mr. Minskoff (App. Appx. 104a).

The evidence itself tends to explain the absence of any statutory, administrative, common law, or commonly accepted definition, and the absence of standards by which things might be adjudged to be "Chinese-type drugs."

We respectfully advise Your Honors that the term "Chinese-type drugs" includes, according to the Government's uncontradicted expert testimony, nearly every known animate and inanimate substance (App. Appx. 101a) and according to the defense expert "*every* substance" (App. Appx. 127a).

Mr. Minskoff, the Chief Enforcer for Foreign Assets Control, was the man primarily charged with enforcing the regulations. He therefore should have been the one person in the United States from whom one could be confident of getting a sensible answer to the question: "What is meant by 'Chinese-type drugs?'"

Mr. Minskoff, after conceding the absence of a statute, rule or regulation providing a definition, provided his own. He offered the following as a useful, sensible, analytical and otherwise all-around, hard-working definition:

"Chinese-type means Chinese-type" (App. Appx. 31a).

While the definition is not one with which we choose to quarrel, it does not seem to be of any earthly use. We would have supposed that a definition of "Chinese-type" as applied to drugs should somehow distinguish its referent from the referent of "American type" or "Mozambique-type". A list of typical commodities appearing as drugs in the *Pen Tsao Kang Mu*, Exhibit 102 (App. Appx. 102a), conceded by the Government to be the authoritative Chinese pharmacopoeia for over 1000 years (App. Appx. 100a) included the following mysterious oriental remedies: seaweed, *ephedrin*, *maize*, *wheat*, *sugar*, *rice*, *barley*, *oats*, garlic, onion, potato, nutmeg, mustard, cherry, peach, lute, kapole, carrot, sweet basil, mint, pumpkin, goldenrod, etc. App. Appx. 102a).

Mr. Minskoff suggested other means for judging what was meant by "Chinese-type", *e.g.* dried ducks shipped from China to Illinois would be "Chinese-type"; whether other things were prohibited would depend upon *how they*

came in, as to yet others, how they were prepared, Chinese or American style, etc. (App. Appx. 33a).

We do not mean to disparage Mr. Minskoff. "Chinese-type" as applied to drugs defies definition.

That such should be so is necessitated by the very nature of Chinese medicine, according to the evidence in the case. Government expert witness Chu Fong Ng testified that the Chinese system of medicine encompasses a belief in Ying and Yang, male and female counterparts. The entire universe consists in mixtures of Ying and Yang. The system entails the further law of nature that disease is caused by imbalance in Ying or Yang. Such upsets in the equilibrium of elemental cosmic forces, Ying and Yang, are restored to harmony by the ingestion of animate or inanimate forces contained in the various foods enumerated above (App. Appx. 101a). It becomes apparent why neither Mr. Minskoff, nor the Department for whom he enforces, can enforce the regulation with any degree of sense. Even were Mr. Minskoff to be anointed to that state of cosmic awareness which would admit of his immediate recognition of Ying and Yang in various concentrations, he would still be faced with the fact that literally everything in the entire universe is composed thereof and that to ban their importation is effectively to deprive the United States of any commeree with any other country of the world whatever. To prohibit transactions in such merchandise outside the country is to confine Americans to transactions within their own parochial limits.

Now obviously nobody thinks or intends that the regulation should be enforeed so as to prohibit all transactions outside the United States. Mr. Minskoff would be the first to deny that such power lies

within his grasp. He substitutes for the all-pervasive language of the regulation his own folksy, common-sensy, down-to-earth approach. Mr. Minskoff's guide appears to be a sincere hope that he can, unaided by any standard, approximate in enforcement what the draftsman of the regulation had in mind. The draftsman, for his part, seemed content that the enforcer supply the basic policy. They supplied Minskoff with an "enforcement technique" but neglected to say what it was they wanted him to enforce. The result could readily have been predicted by any student of government.

For example, it is given to Mr. Minskoff to enforce a regulation which generates the concept of a "Chinese-type antique . . . which is decorated with . . . Masonic scenes or devices . . ." (31 C.F.R., Ch. V, § 204, (a)(2) ij, Appx. B, *infra*). If Mr. Minskoff seeks guidance from the regulation to determine what "Chinese-type" means within the precincts of the Treasury Department, he need look no further.

Under an "enforcement technique" which bans absolutely everything from importation, making exceptions in the case of goods determined by the Enforcer not to constitute "Chinese-type drugs" (App. Appx. 29a) it is hardly surprising that one department of a governmental branch admits merchandise, assessing duties on its lawful importation, only to have the bureau across the hall seize the same merchandise as contraband and send its importer to the penitentiary.

We invite Your Honors to heed other definitions offered by Government witnesses, the prosecutor and the judge.

Customs Agent Walsh was able to distinguish foods from drugs. Food, according to Walsh, was something which

the Government allowed a person to eat while a drug is something imported, for medicinal purposes (App. Appx. 67a).

Walsh identified a number of things as foods which other witnesses called drugs (Compare Appellant's Appendix 67a, 102a and 127a). Walsh defined "Chinese-type drugs" as originating from Red China (App. Appx. 67a) which seems to us to be the only sensible suggestion offered in the case. But that suggestion was rejected as it would have required petitioners' acquittal, there being no evidence of Chinese origin.

The prosecutor suggested that the term meant something like "'patent medicine" to Americans. To him Hadacol and Carter's Little Liver Pills were illustrative (App. Appx. 72a-73a).

Government witness Hall testified that some Chinese people regarded as foods what others regarded as drugs (App. Appx. 76a); that all herbs, Chinese or otherwise, were Chinese medicines (App. Appx. 76a); that if he used orange peel to flavor a food, he would call it a food, if in a prescription, a drug (App. Appx. 80a). Witness Ng, the Government expert, said that to him a drug was "something strictly for the mind" (App. Appx. 98a). The Court held that Ng was an expert (App. Appx. 96a).

The trial judge said, "the words include medicine, herbs, tea and what have you"; that the question was to be considered from the standpoint of the Chinese; and that the regulation *applied* to certain persons of Chinese nationality (App. Appx. 99a); that "Chinese-type drugs" were items "so considered by the public" (App. Appx. 100a). Parenthetically, neither these "definitions" nor any definition offered in the Court's instructions were shown to apply to the objects put in evidence.

Witness Ng suggested another way to differentiate foods from drugs. If you bought them in a drug store they were drugs and if you bought them in a grocery store they were food (App. Appx. 100a-102a).

The prosecutor suggested yet another definition. "Chinese-type drugs" were something that could not be imported so long as they were labeled with a Chinese name expressed in Chinese characters. The Court announced that there was "merit" in the prosecutor's proposal (App. Appx. 102a).

Witness Ng finally testified that to determine whether or not something which was imported constituted Chinese drugs, what one had to do was to satisfy Foreign Assets Control. If you could satisfy Foreign Assets Control that something was not a Chinese-type drug, then it could come into the country. It is not surprising, perhaps, that the person who had to be satisfied as to whether something was or was not a "Chinese-type drug" was Mr. Minskoff (App. Appx. 104a).

Defense witness Chang, Professor of chemistry, pathology and pharmacognosy at the University of Tennessee, asked what the regulation prohibiting "Chinese-type drugs" would cover, replied that it sounded to him like "everything is covered" (App. Appx. 127a) excluding, possibly, automobiles (See original Transcript of Evidence, page 1735).

Other regulations might provide inferential guidance to a litigant in his effort to determine what is meant by "Chinese-type." Section 500.204, 31 C.F.R., Chapter V, also forbids transactions in:

> "Antiques, Chinese-type (other than Chinese porcelain . . . which is decorated with . . . American political, memorial or Masonic scenes or devices . . .)"

To the extent that any member of the public might believe that he understands what is meant by a Chinese-type antique, he would be well advised to reconsider his concept of the term "Masonic devices". Should any reader of the regulation feel a sense of inadequacy in attempting to visualize just what a Chinese-type antique is, in the mind of the author of the regulation, he must console himself with the thought that enforcement is "discretionary with the Treasury Department" (App. Appx. 32a).

The regulation does not otherwise define "Chinese-type" except as an inference from the description of certain types of "Chinese-type" antiques above quoted.

Mr. Minskoff is by no means handicapped by the lack of definition, because, after all:

"Chinese-type means Chinese-type" (App. Appx. 31a).

The vagueness of the terms employed is perfectly consistent with Mr. Minskoff's stated intention to retain "discretion" to "pass on" each case according to the folksy standards known only to himself. Neither the trial court nor the Court of Appeals ever arrived at a working definition of the term. Whatever "Chinese-type" means, a definition of "Chinese-type" antiques which will include porcelain ware tastefully emblazoned with Masonic crests and American political scenes, ought to be broad enough to satisfy even Mr. Minskoff's yearning for an area within which he can "exercise discretion."

Far from filling in details, the agency in question has laid down regulations no less broad than those enacted by Congress, but which lack any precision whatever.

• • •

This was a serious criminal case eventuating in what amounts to a life sentence to appellant Quong, age 74. Yet it was necessary to call upon experts in an esoteric specialty to determine, not that the law had been violated, but what the law *meant*. Even then, it appears that literally everything is meant by "Chinese type drugs."

CONCLUSION.

We respectfully submit that where a statute provides criminal penalties for violations of administrative regulations issued under the statute, those penalties cannot be exacted where the regulations promulgated address themselves to a domain not entailed by the authorizing statute. We further submit that in no event may an administrator forbid transactions in merchandise, where the terms used to describe that merchandise are so loose as to defy definition.

Respectfully submitted,

MELVIN B. LEWIS
FRANK W. OLIVER
Attorneys for Petitioners

APPENDIX A

Nos. 14347-8-9

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOE QUONG, JOE WING FONG and JOE WING WAH, *Defendants-Appellants.*	On Appeal from the United States District Court for the Western District of Tennessee.

Decided May 31, 1962.

Before: MAGRUDER and O'SULLIVAN, Circuit Judges, and DARR, District Judge.

DARR, District Judge. Joe Quong and his two sons, Joe Wing Wah and Joe Wing Fong, appellants, with others besides, were accused in the first five counts of a thirteen-count indictment with five separate conspiracies, each charging an agreement to violate the Trading With the Enemy Act and regulations thereunder[1] and to violate the statute making it unlawful to knowingly import merchandise contrary to law.[2] Two counts (VII and VIII) charged Joe Quong with the substantive offense of violating the

[1] 50 U. S. C. A. App. § 5(a) and (b), Title 31, Code Federal Regulations, Chapter V, sub-title B, § 500.101, et seq.

[2] 18 U. S. C. A. § 545.

Trading With the Enemy Act at two different times; two counts (VI and IX) charged Joe Wing Wah with the same substantive offense at separate times; one count (VII) accused Joe Wing Fong with violating the Trading With the Enemy Act; and Lun Fee Lee was one of the accused in count V of the indictment as a conspirator and was charged in count XIII with importing merchandise into this country contrary to law.

Only the appellants and Lee were the accused at the trial. Lee was acquitted; the appellant Fong was acquitted of the charge in the substantive count (VII) but convicted of the five conspiracy counts (I-V); and Joe Quong and Joe Wing Wah were convicted on all charges against them.

The Trading With the Enemy Act was made a law during the time of World War I, since which time several amendments have been added. This law provides that the President is authorized, by direct action or through a designate, to make regulations for carrying out the purposes of the Act. The Act is effective during war or a national emergency.

During the course of the United States' action in Korea, in combat with Chinese Communists, the President of the United States declared an emergency. The President delegated to the Secretary of the Treasury certain powers to implement the Act in accord with its terms. On December 17, 1950 the Secretary promulgated and issued the Foreign Assets Control Regulations, which prohibit any dealings by persons subject to the jurisdiction of the United States, in any manner, direct or indirect, with Communist China. Among the prohibited goods listed in the Regulations is "Chinese type drugs." The purpose of the Regulations being to deprive the Chinese Communists of all economic advantages accruing from trade with the United States and the availability of United States dollars.

The law against smuggling, among other things, makes it illegal to fraudulently or knowingly import or bring into the United States any merchandise contrary to law, or receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law.

It might be here noted that the indictment sets out the merchandise transported in violation of the Trading With the Enemy Act and Regulations thereunder to have been Chinese-type drugs.

The proof, to be more particularize hereinafter, submitted to the jury reveals the transactions by the appellants and others to have been as follows:

The life of the conspiracy was between November 1, 1956 and October 1, 1958. In the transactions hereafter recited the appellants used various fictitious names, particularly Joe Quong used the name Joe Wilson.

Quong and his family, including the two sons here involved, lived in Chicago, Illinois, at the beginning of the conspiracies. On May 1, 1957, Joe Quong and his son Joe Wing Wah appeared in Memphis and established a base of operation. Quong's other son, appellant, Joe Wing Fong, remained active in a firm called Sing Lee Company, 743 W. North Avenue, Chicago, Illinois, where he, under the name of Fong Wing, received much of the merchandise in question from other points and made shipments to Quong and Wah at 1240 Florida Street, Memphis, Tennessee. Quong and Wah made arrangements with a warehouse to receive merchandise and bank accounts were opened. Joe Quong had a store building on Florida Street in Memphis with a sign on the front window "Joe Wilson—Teas and Dried Vegetables," which was used as a front for dealing

in Chinese-type drugs. Quong had also arranged for warehouses in other cities for the storage of "Chinese products, Chinese food."

In Vancouver, British Columbia, Canada, were housed Gold City Estates, Ltd. and Kuo Seun Importers, Ltd., both named co-conspirators in the indictment. These organizations were affiliates, Seto Gock being the principal officer. Other import organizations in Vancouver with which appellants had dealings were Kam Yeu, Ltd. and a firm called Yeun Fong. To these organizations in Vancouver, there came from the Orient Chinese-type drugs which were thereafter transported by Canadians cross-country to points in Canada across the border from Niagara Falls, New York and from Detroit, Michigan. This merchandise entered the United States without complying with the law and thereafter moved to where they ultimately came into the possession of the appellants, or some of them, in Memphis and Chicago.

Quong had a circular showing a list of his products, identified by witnesses for the government and one witness for the appellants as listing Chinese-type drugs. By this circular and otherwise these Chinese-type drugs were sold to various retail outlets. These drugs were ordered by appellants, principally Joe Quong, from or through the Gold City Estates, Ltd.—Kuo Seun organizations in Vancouver and less amounts from the other organizations in that city.

Payments for the purchases of the merchandise and for expenses of transportation and storage were made by checks and drafts signed in the most part by Joe Quong, but some of them were signed by Joe Wing Wah and some by Joe Wing Fong. On the expense items an example is, Harry Chad and Emil Buchamer were paid $15,723.77,

principally for smuggling the goods into this country. There was a total of some eighty-six (86) banks checks and drafts issued for the purposes mentioned and the sum of the amounts thereof was $111,723.77.

The operations by the Canadians and these appellants were underhand and reflect conniving with each other.

The proof offered in connection with the conspiracy and the proof to sustain the substantive counts against Quong and Wah covered the subject of venue.

1. The appellants did not testify for themselves and the proof offered for defense was negligible.

The trial of this case consumed ten trial days. Exhibits amounting to about fifteen hundred sheets of paper were introduced in evidence.

As the appellants did not introduce appreciable proof in defense of the accusations against them, their complaints here are the assertions of reasons why the government had no case or made no case against them.

The record discloses that at the trial there were a flood of objections on the part of appellants' attorneys to the admissibility of evidence, the competency of evidence, the conduct of the Trial Judge and the United States Attorney and to the Judge's charge. These objections are generally incorporated into some twenty-five questions under the heading "Statement of Questions Involved" and offered as reasons why the judgments should be reversed.

2. The appellants declare that the government had no case against them to start with because (1) the words "Chinese-type drugs" in the Regulations are meaningless and that the Regulations are void and (2) that the indictment contained the words "Chinese-type drugs" and that these words are meaningless, and thus there was no legal accusation against them.

These objections go to the substantive counts and to the portion of the conspiracy counts charging intent to violate the Trading With the Enemy Act.

The witness John Hong Hall testified that he was the third generation dealing in Chinese drugs in Chinatown, San Francisco. He had in the courtroom a number of packages of the merchandise he had received from appellant Quong and testified as to each package, stating they were traditionally and historically Chinese drugs or Chinese-type drugs and in many instances gave the ailment for which the drug was used. He further said that when the Regulation pertaining to the importation of this type of merchandise was first published, the Chinese papers carried big headlines with the story that such type merchandise could no longer be legally imported. He further said that after the Regulations came out Chinese-type drugs were unavailable in the United States and he knew they could not be imported; that he knew the drugs he bought from Quong were imported, but that he did not think he was violating the law by purchasing the drugs after they were brought into the United States.

Mrs. Lapierre, connected with the Great Western Freight Forwarders, Ltd., Brantford, Ontario, Canada, testified that she found in a damaged package of the merchandise in question and in other cartons, which she opened, such things as seeds, roots, salve, liquids and small packages of powder wrapped in paper on which were instructions in Chinese figures.

The appellants, particularly Quong, had lists of merchandise for sales purposes which were identified by witnesses familiar with China and its traditions as listing Chinese-type drugs. Likewise these witnesses testified that the substances described by Mrs. Lapierre as being found in the cartons were also Chinese-type drugs.

An indictment or a regulation, employing words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them is good and valid. *Connally* v. *General Const. Co.*, 269 U. S. 385, 391.

From the proof, it is quite evident that Chinese people, including these appellants, and anyone else interested in dealing in such commodities, well knew the meaning of the term "Chinese-type drugs" when it appeared in the Regulation. Obviously the appellants knew what these words meant when advised of the charge in the indictment.

The Regulations are valid and the indictment is good.

In this connection and to settle another complaint, the definition of Chinese-type drugs, as given in the instructions to the jury, was in accord with the proof.

3. Another claim made by the appellants is that there was no venue in the District Court at Memphis, Tennessee. There was competent proof that Quong and Wah purchased at, and mailed from, Memphis drafts in payment for the merchandise and for the services of some Canadian collaborators. This sets up venue both as to the conspiracy and as to the substantive offenses. 18 U. S. C. A. § 3237; *United States* v. *Seagraves*, 265 F. 2d 876; *United States* v. *Cohen*; 197 F. 2d 26.

4. Another reason assigned for reversing the judgments is that there was no allegation in the indictment or evidence of a foreign national or government having any interest in the proscribed merchandise.

The allegations in the indictment charged the offenses by citing the Act and Regulations which was notice to the appellants of the accusations.

The actual evidence revealed that many Canadian nationals, including warehouse people and carrier employees, had an interest in the forbidden goods. The term "any interest" must be defined in the broadest sense and includes any interest whatsoever, direct or, indirect. *United States* v. *Broverman*, 180 F. Supp. 631, 636.

5. There is a claim of prejudicial error in the admitting of documentary evidence consisting of books and records of warehousemen, of carriers, of banks and of Kuo Seun.

A study of the record leads us to believe that the Trial Judge was not in error in admitting the government's records and the records from the warehousemen, carriers and banks. These were identified in substantial compliance with statutory provisions.

The admitting in evidence of the documents coming from the files of Kuo Seun should be discussed. These documents were obtained by a member of the Royal Canadian Mounted Police upon search warrant. The Mountie personally took from the Kuo Seun files twelve empty envelopes addressed to "Kuo Seun and Gold City Company," showing on each the cancellation of the stamps to have been made in Memphis, Tennessee, and written thereon the return address "Joe Wilson, Florida Street, Memphis, Tennessee." Some of these letters were transmitted by air mail and some of them by registered mail.

The Mountie also procured from an officer of the Kuo Seun a ledger sheet or page showing the account kept with Fong Wing (this being an alias used by Joe Wing Fong); and also a number of shipping papers which involved the accused. All these documents came to the Mountie by reason of an arrangement made with an officer of the Company, who agreed to assemble them, whereby the Mountie could pick them up at a later time. The action

of the Mountie and his testifying in the United States District Court came about through a treaty between the United States and Canada.

It would seem that these papers taken from Kuo Seun, by operation of law, could be introduced as being in substantial compliance with the Business Records Act [28 U. S. C. A. § 1732]. These were taken by the Mountie from the custodian of the records and the dates on the envelopes and the chronological dates on the ledger sheet, showing the account, were proven to correspond with orders and shipments. Thus taken all together, there is a showing that these records were kept in the regular course of business and filing of the envelopes and the entries made in the book or ledger sheet were about the time of the transactions. However, in any event, this documentary evidence was cumulative as there was proof of checks and drafts being mailed to Kuo Seun by appellants and evidence of shipments from Kuo Seun to points in Eastern Canada destined to appellants or some one of them. Some of the other record evidence was also cumulative.

We believe and conclude that the admission of the documentary evidence by the District Judge, charged as erroneous, did not visit any prejudice upon the appellants, nor "affect substantial rights" of the appellants. *Rule 52(a), Federal Rules of Criminal Procedure; Gordon* v. *United States* (C.A. 6), 164 F. 2d 855, cert. den. 333 U.S. 862; *National Labor Relations Board* v. *Sharples Chemicals* (C.A. 6), 209 F. 2d 645; *United States* v. *Lieblich* (C.A. 2), 246 F. 2d 890, cert. den. 355 U.S. 896; *United States* v. *Bodner* (C.A. 6), 248 F. 2d 481.

6. The appellants put forward the claim that the Trial Judge was in error in denying a mistrial upon the ground of an extra-judicial statement made by the government's witness John Hong Hall. Actually Hall gave the same

testimony in open court as was in the statement. This contention has no merit.

7. It is further said that reversible error was made when the Trial Judge brought out before the jury the fact that Hall had entered a plea of guilty to the substantive offense of violating the Trading With the Enemy Act. Apparently the Trial Judge asked this question so he could charge the jury on the value of the evidence of an accomplice. He did so in his charge and clearly cautioned the jury not to consider the fact that Hall had pleaded guilty, or that any other person had pleaded guilty, but to decide the case solely on the evidence adduced against the appellants. We see no prejudicial error in this.

And along the same line, the complaint is made of the statement of the United States Attorney that another person not on trial and who did not testify had entered a plea of guilty. The Trial Judge immediately ruled this out and repeated the ruling in his charge. We believe that this had no weight with the jury and is not reversible error.

8. Another reason advanced for a reversal of the judgments is that the proof was insufficient to warrant a conviction under the law pertaining to smuggling.

Also, it is claimed that the indictment did not charge smuggling but charged illegally importing merchandise and that the Judge's instructions to the jury did not cover the charge in the indictment. The appellants make a contention that the word "smuggling" would only apply to the first paragraph of the law as found in the Criminal Code of the section entitled "Smuggling Goods Into the United States," [18 U. S. C. A. § 545] and not to the second paragraph providing for illegally importing or bringing merchandise into the United States.

This entire section of the Code pertains to smuggling and does provide that different acts would violate the law, but actually the entire section forbids smuggling, as announced by its subject, "Smuggling Goods Into the United States." The use of the word "smuggling" in the Judge's instructions to the jury was not harmful as he made special reference to the charge in the indictment and made explanation of the presumption of possession authorizing conviction.

We see no error in the Judge's instructions in this respect.

The further contention is made that there can be no presumption of guilt by reason of possession as provided by this law because the proof does not place the merchandise in the possession of the appellants.

Quong and Wah were convicted of the substantive offense of violating the Trading With the Enemy Act. Thus, their conviction under the conspiracy counts could well be sustained as a conspiracy to violate this Act. However, Fong was not convicted on the substantive count.

The law concerning smuggling goods into the United States contains a provision that possession, if unexplained, is sufficient to authorize conviction. But in this case it is not necessary to depend on possession of such goods because there are sufficient facts revealing that the merchandise was smuggled into the United States with knowledge on the part of the appellants. Mrs. Lapierre testified that Sidney Rock and Harry Chad, two coconspirators, at her warehouse in Brantford, Canada, in her back yard, arranged secret compartments in a large truck and in a small truck for the purpose of smuggling the merchandise in question across the border to Lee Young Enterprises in Niagara Falls, New York; that the goods actually moved

out in these secret compartments; and that Sidney Rock said he was the Lee Young of the Lee Young Enterprises in Niagara Falls. A tie-in of the evidence disclosed that this very merchandise, by prearrangement, came into the possession of Quong and Wah in Memphis and Fong in Chicago.

Officials from the port in Detroit and the port in Buffalo (Niagara Falls) testified that there was no record of the forbidden merchandise passing through these ports during the critical time.

There is no direct proof of the smuggling from Canada to Detroit, but there is proof of a pattern of operations by the coconspirators and that quantities of the merchandise were shipped to appellants from Detroit under suspicious circumstances.

However, sufficient for the conviction is the direct proof of the smuggling of the shipments from Canada to Niagara Falls and appellants' knowledge of and participation therein. In addition, the proof places the forbidden merchandise in the possession of the appellants and no effort was made to explain such possession. This in itself is sufficient to warrant conviction under the smuggling statute.

We conclude that there was substantial proof for the jury concerning violation of the law pertaining to smuggling and find no error in the Judge's instructions to the jury.

9. The contention is made that if the proof is sufficient to warrant a conviction for conspiracy, only Count I is sustained.

Count I is the basic conspiracy and Counts II-V charge the same conspiracy, the conspirators named being the same as those in Count I; except in each Count a purchaser of the drugs is added. The respective purchasers in these

Counts were John Hong Hall, Fong Quck Tip, Wong Shew Git and Lun Fee Lee.

John Hong Hall testified that he bought some of the merchandise from Quong, but understood it was not wrong to make purchases of such merchandise within the United States. Fong Quck Tip and Wong Shew Git did not testify. The only testimony affecting them was that checks were made or endorsed by Git and shipments had gone out to Git and Tip. Lun Fee Lee, the additional alleged conspirator in Count V, was found not guilty.

The gravamen of a conspiracy is the *agreement* to commit the unlawful act. There is no evidence by which the jury could infer that these purchasers-conspirators were parties to any agreement to violate the laws named in the indictment. The sale and purchase of the merchandise could well be charged as an overt act against the other conspirators, and that only. Thus Counts II-V are exactly the same as Count I, except the addition of other overt acts. The appellants cannot be convicted five times on the same charge.

We believe that there was sufficient proof on only the conspiracy charged in Count I. The result would perhaps not be reversible error as to the sentences received by Quong and Wah, but would affect the sentences placed on Fong. Quong and Wah received concurrent sentences of five (5) years on each conspiracy count. There was imposed on Fong concurrent sentences of five (5) years on Counts I, II and III and five (5) years on Counts IV and V, concurrent, the sentences on I, II and III and the sentences on IV and V were consecutive. These sentences imposed upon Fong, being consecutive as to the conspiracy counts to a total of ten (10) years, would be an error of substance.

The District Judge should have sustained the appellants' motions for judgments of acquittal on Counts II, III, IV and V of the indictment.

On the whole and considering the sufficiency of the evidence, Mr. Eli Slotkin, Special Representative, Foreign Assets Control, testified that he had made an investigation of the case and had compiled the information revealed by sundry documentary exhibits. He testified, that Joe Quong had issued thirty-six checks and thirty-four drafts in payment of the merchandise and expenses; that these seventy checks and drafts totaled $102,264.97; that Joe Wing Wah had purchased three drafts, totaling $5,506.00; that Joe Wing Fong had purchased three drafts, totaling $3,000.00; that the total checks and drafts for such payments amounted to $111,723.77 of which $72,000.00 went to Seto Gock Gold City Estates or Kuo Seun in Vancouver, to Harry Chad and Emil Buchamer a total of $15,723.77, to Kam Yuen, Ltd., at Vancouver, $13,000.00, and to a firm called Yuen Fong, likewise at Vancouver, $1,500.00, and that a number of checks and drafts were sent to two men, Lee Fun Chong and Gim Lee of Toronto, totaling $9,500.00. He set out minutely the shipments of merchandise which finally reached Quong and Wah in Memphis or Fong in Chicago. He also gave details concerning drafts issued by the Vancouver organizations which were endorsed in Hong Kong. He itemized the shipments coming to the appellants and going from them to retailers. He gave the total of the shipments to 1240 Florida Street or Vaiden's Warehouse in Memphis, Tennessee, as totaling one thousand eight hundred sixty-three parcels, weighing one hundred twenty-four thousand two hundred seventeen pounds.

Mr. Slotkin's testimony and other proof revealed that some of the shipments went this way: A large number of cartons of Chinese-type drugs, some marked as coming

from the mainland of China, were shipped from Kuo Seun Importers, Ltd., 89 East Pender Street, Vancouver, Canada, by motor carrier (Gill Interprovincial Truck Lines) to Toronto, Canada, then from Toronto reshipped to Brantford, Canada, and stored with Great Western Freight Forwarders, Ltd.; that two trucks were prepared by Sidney Rock and Harry Chad in Brantford with secret compartments and the merchandise was smuggled by them across the border to Niagara Falls, New York, to Lee Young Enterprises and from there shipped to Joe Wilson (Joe Quong) in care of Port Warehouses Inc., 47 Vestry Street, New York City and from there to Vaiden Warehouse Company, 699 South Main, Memphis, Tennessee, the warehouse used by Quong and Wah in Memphis. That other shipments were made by Fong Wing (Joe Wing Fong) from Chicago to Joe Wah Wing, 1240 Florida Street, Memphis, and to Joe Wilson (Joe Quong), 1240 Florida Street, Memphis. That Fong received in Chicago much of this merchandise, which was shipped out from Detroit at the instance of Emil Buchamer, one of the smugglers. That shipments were made of the forbidden merchandise from the Memphis address to the West Coast and Hawaii and New York. That many of the way bills of the shipments coming to appellants were marked "imported goods."

A full study of the entire record results in the belief that there was sufficient admissible evidence presented to the jury to sustain their verdict. Under these circumstances the jury verdict cannot be disturbed. However, the convictions on Counts II, III, IV and V are excluded.

The judgments are affirmed, except as to Counts II, III, IV and V and the judgments on these Counts are reversed.

The case is remanded for action in accord with the views herein expressed.

O'SULLIVAN, Circuit Judge, concurring. I concur in the opinion of Judge Darr. However, I do not wish such concurrence to be construed as expressing a conviction on my part that all of the numerous items of documentary evidence received in this case were sufficiently identified so as to justify their admission. It is not enough that records be merely found in the office of a particular company, or that someone testifies that such records are within his custody, to render them admissible under Section 1732, Title 28, U. S. C. A. In my opinion, some of the record evidence admitted was not sufficiently authenticated or otherwise rendered admissible. Such evidence, however, was cumulative and did not provide any of the essential links in the Government's case. The admission of such evidence and other rulings by the district judge, charged as erroneous, did not, in my opinion, visit any prejudice upon the appellants nor "affect substantial rights" of such defendants. F. R. Cr. P. 52(a).

APPENDIX B

Statutes and Regulations Involved.

Section 5, Title 50 Appendix, U. S. C. A., provides in relevant part:

> **"§ 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver**
>
> "(a) . . .
>
> "(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise —
>
> "(A) . . .
>
> "(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . . and the President may, in the manner hereinabove provided, take other and further measures

not inconsistent herewith for the enforcement of this subdivision.

"(2) . . .

"(3) . . . Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; . . . "

Title 31, Code Federal Regulations, Chapter V, Subpart B, § 500.204, provides in relevant part:

"§ 500.204 *Importation of and dealings in certain merchandise.* (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) • • •

"(2) Merchandise specified in this subparagraph, however processed, unless such merchandise is imported directly from a country named as excepted for that type of merchandise:

• • •

Type of Merchandise.	*Exceptions*
"Antiques, Chinese type (other than Chinese porcelain which qualifies within the provisions of par. 1811 of the Tariff Act of 1930 and which is decorated with the armorial bearings, crests, monograms, cyphers, or badges of European or American families or societies or bearing motifs based thereon, or with European or American politi-	none

cal, memorial, or Masonic scenes or devices or with European or American figures, ships, or other scenes, or with motifs or inscriptions in English, Latin, or any other European language).

• • •

"Drugs, Chinese type ..... None.

• • •

"Foodstuffs, Chinese type ..... None.

• • •

"Tea, Chinese type ..... Formosa."

• • •

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No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1962

JOE QUONG, JOE WING WAH AND JOE WING FONG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
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657272—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 285

JOE QUONG, JOE WING WAH AND JOE WING FONG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the court of appeals (Pet. App. 1a–16a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1962 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 30, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners were charged with and convicted of conspiracy to import and importation of "Chinese

type drugs" located outside the United States, in violation of the Foreign Assets Control Regulations, 31 C.F.R. 500.204, issued pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 5(b).

The questions presented are:

1. Whether Section 500.204 of the Foreign Assets Control Regulations, insofar as it regulates importation of Chinese-type drugs "outside the United States" without regard to whether "any foreign country or a national thereof" has an interest in such drugs, is void as in excess of the statutory authority conferred by Section 5(b) of the Trading with the Enemy Act.

2. Whether the term "Drugs, Chinese type," as used in Section 500.204 is unconstitutionally vague, thereby rendering the regulation void.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the appendix, *infra*, pp. 13-14.

STATEMENT

After a trial by jury, the three petitioners, Quong, Wah and Fong were convicted of charges in Count I of a thirteen-count indictment that they had conspired, *inter alia*, "To purchase, transport, import or otherwise deal in or engage in any transaction with respect to * * * Chinese-type drugs, outside of the United States, without such transactions being specifically authorized * * *," in violation of the Trading with the Enemy Act, 50 U.S.C. App. 5(b), and the Foreign Assets Control Regulations issued thereunder, 31

C.F.R. 500.101, *et seq.* (App. 4a–10a).[1] Petitioner Quong was convicted of charges in Counts VII and VIII of having engaged in two separate transactions for the purchase of Chinese-type drugs located outside the United States (App. 18a–19a); petitioner Wah was convicted of similar substantive violations of the Act and the Foreign Assets Control Regulations in Counts VI and IX (App. 17a, 19a).

Petitioners Quong and Wah each received a sentence of 5 years under Count I charging conspiracy, and concurrent sentences of ten years on each of the two substantive counts under which they were convicted, the ten-year sentences to run concurrently with the five-year sentence under the conspiracy count. Quong was also fined $15,000 and Wah $5,000 (App. 173a–176a). Petitioner Fong was sentenced to five years imprisonment and a fine of $5,000 under Count I (App. 177a–178a). The Court of Appeals for the Sixth Circuit (Judge O'Sullivan concurring) affirmed each of these convictions and sentences (Pet. App. 1a–15a; 16a).

The facts, insofar as pertinent to the issues raised in the petition, may be summarized as follows: During the period of the conspiracy, November 1956 through September 1958 (App. 167b, 181b–182b, 226b), petitioners, along with others, engaged in the

[1] Petitioners' appendix in the court of appeals, now on file with the Clerk of this Court, will be cited herein as "App." plus the page reference followed by the letter "a." Respondent's appendix in the court of appeals, also on file in this Court, will be cited as "App." plus the page reference followed by the letter "b."

business of importing from overseas and selling throughout the United States by mail substantial quantities of herbs and other natural products traditionally used in the Chinese community as home remedies for the treatment of diseases (e.g., App. 122b–128b, 142b–155b, 161b–167b). These Chinese-type drugs were imported at Vancouver, British Columbia, and shipped by the Canadian importers to points in Ontario, Canada, where they were relabelled for delivery to petitioners (who were operating under various aliases) (e.g., App. 147b–155b, 173b–175b, 320b–325b). The drugs were then moved by clandestine means—in the false-front of a tractor-trailer or the false gas tank of a half-ton truck—to warehouses in Niagara Falls, New York, or Detroit, Michigan, and from there to petitioners' warehouses in Chicago, Illinois, and Memphis, Tennessee (App. 151b–155b, 161b–167b). From their warehouses in Memphis and Chicago, petitioners, again using aliases, would fill orders for this merchandise which they received in response to price lists circulated to retail dealers in Chinese herbs and home remedies (e.g., App. 196b–197b, 226b–229b).

Petitioners moved a large volume of merchandise. The records of the various shippers and warehouses show that during the period of the conspiracy petitioners received a total of 32 shipments, comprising 1,863 parcels and weighing 124,2[illegible] pounds, at their warehouse at Memphis (App. 398b–401b). During the more limited period January 1957 to September 1958, petitioners made at least 482 shipments of

Chinese merchandise, totaling 2,441 parcels, from their warehouses to retailers all over the United States (App. 181b–185b, 191b–198b, 203b–204b, 211b, 416b–420b). Records of the companies which imported the merchandise at Vancouver indicated extensive dealings with petitioner Fong in Chicago and Quong in Memphis (App. 306b–309b, 312b–318b, 414b–416b). They disclosed that during the period of the conspiracy petitioners had issued through various banks in the United States 80 checks and drafts totaling $111,723.77 (App. 397b–398b) with a substantial proportion drawn to the Vancouver importers. The checks and drafts sent to these importers were subsequently reissued by banks in Vancouver and, according to their endorsements, cashed in Hong Kong (App. 117b–121b, 402b–408b).

Petitioners were receiving and selling by means of these shipments herbs and drugs of types which originate from mainland China or Hong Kong and are traditionally used in the Chinese community for treatment of medical diseases. This was testified to by a witness who was part of the Canadian network by which the goods were transported from Vancouver across to the United States (App. 148b–158b) and by a customer who purchased the merchandise from petitioners in this country (App. 227b, 233b–240b). The latter, a dealer in Chinese drugs and herbs in San Francisco, testified that in 1956 he had received a circular from petitioner Quong which offered for sale various traditional Chinese medical home remedies (App. 222b–223b, 227b). Since the Foreign Assets Control Regulations had closed off his previous

sources of supply for these goods and preceded his importing them himself (App. 224b, 230b),[2] he had commenced ordering such merchandise from petitioners (App. 226b–227b). He estimated that thereafter he ordered and received shipments of over one hundred different medical preparations from petitioner Quong (App. 227b, 230b, 231b, 267b, 271b). He testified that the goods he received traditionally came from mainland China and that Chinese lettering on the outside of the packages indicated that they were from either mainland China or from Hong Kong (App. 233b–248b, 253b–259b, 265b, 269b). He had in the courtroom a number of packages of this merchandise and identified each package, giving the Chinese name of the drug and the ailment for which it was used (App. 240b–266b). Other witnesses, including a professor of pharmacology called on behalf of the petitioners, and a United States Customs official, testified that at least half the products included on petitioners' circulars constituted Chinese-type drugs (App. 369b–370b, 457b–458b).

Goods seized in September 1958 by a customs official from the Chicago business offices used by petitioner Fong included several types of medicinal wines marked "For Chinese Only," Lotus Roots Powder made in Hong Kong, "Red Laxative Pills," and other remedies marked "Made in Canton" (App. 331b–336b).

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[2] The witness testified that he had applied for a license to import Chinese-type drugs but that his application had been denied (App. 230b).

ARGUMENT

1. Section 500.204(a)(2) of the Foreign Assets Control Regulations is a reasonable exercise of the powers conferred on the President by Section 5(b)(1) of the Trading with the Enemy Act. Petitioners' contention that the failure to restrict this regulation to property in which a foreign country or a national thereof has an interest renders it void presents no question warranting review by this Court.

Section 5(b)(1) of the Act, *infra*, pp. 13–14, is a broad grant of power. It authorizes the President or his designate, during war or national emergency, "by means of instructions, licenses, or otherwise" to

> * * * investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, * * * transfer, * * * importation, * * * dealing in, * * * or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person * * * subject to the jurisdiction of the United States * * *.

As a means of carrying out this mandate, Section 5(b)(1) further empowers the President to require any person to furnish under oath complete information "relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may otherwise be necessary to enforce the provisions of this [subsection]."

On December 16, 1950, during the Korean Conflict, the President declared a national emergency (Proc. No. 2914, 64 Stat. A454, 15 F.R. 9029). On Decem-

ber 19, 1950, the Secretary of the Treasury, to whom power to implement the Act had been delegated under Executive Order 9193 (7 F.R. 5205, 5206), promulgated and issued the Foreign Assets Control Regulations which prohibit any dealings by persons subject to the jurisdiction of the United States in any manner, direct or indirect, with Communist China (31 C.F.R. 500.101, *et seq.*). Included among these regulations was Section 500.204 which provides that except as specifically authorized by means of rulings, licenses, or otherwise, no person subject to the jurisdiction of the United States may import or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is "Drugs, Chinese type" and other enumerated items.

The scope of Section 500.204(a)(2)—its regulation of dealings in specified merchandise located outside the United States—is a reasonable and necessary means of insuring that goods in which Communist China or its nationals have an interest do not enter the United States. Thus, the Foreign Assets Control Regulations, 31 C.F.R. 500.204(a)(1), exclude from the United States, except where specially authorized, goods which have their origin in that country. However, because the origin of goods can be masked and is, in any event, often difficult to detect (App. 8b–9b), the limited reach of 500.204(a)(1) is not enough to insure the desired exclusion. To achieve this, Section 500.204(a)(2) requires persons dealing in products typically originating in China to obtain a license or

other authorization for any such transactions. This affords the government an opportunity, in advance of importation of the goods, to make the "investigation" authorized by the Trading with the Enemy Act (50 U.S.C. App. 5(b)) and to determine whether in fact the goods originated in China. If, in the course of this screening process, the prohibited foreign interest is found, the transaction can be prohibited in accordance with the Trading with the Enemy Act. This provision of the Act for "investigation" provides ample authority for Section 500.204(a)(2) insofar as it requires advance authorization of transactions involving property which typically originates in China.

Other provisions of the Trading with the Enemy Act also require rejection of petitioners' contention that the powers it confers limit the scope of permissible regulations to property in which a foreign country or national thereof has an interest. The statute gives specific recognition to the President's need for broad enforcement powers and grants them in terms sufficient to cover the regulation at issue here. It provides that the President may require any person to furnish under oath complete information "relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this [subsection]" (50 U.S.C. App. 5(b)(1), *infra*, p. 13–14). The requirement that all importers of "Drugs, Chinese type" apply for a licence or other authoriza-

tion to deal in these products outside the United States falls well within these reporting powers conferred by Section 5(b)(1) of the Act as a means of enforcing the exclusionary bar of that statute now invoked against the products of Communist China by the Foreign Assets Control Regulations.

2. There is no substance to petitioners' remaining contention that the term "Drugs, Chinese type," as used in Section 500.204, is too vague and indefinite to support a criminal conviction (Pet. 16–25). The phraseology is not unique to this one category of products. It is used elsewhere in the regulation to describe "Beverages, Chinese type," "Tea, Chinese type;" "Carpet wool, Tibetan and Nepalese types," "Foodstuffs, Chinese type," etc.

Section 500.204 is promulgated for the regulation of the commercial activities of persons engaged in the business of importing merchandise located outside the United States. It may be assumed that the members of this limited class are experienced in the meaning of terms used in importing regulations and aware of the customs of the business community which give them content. The term is not confusing, as the petition suggests, and is reasonably understood to have the meaning ascribed to it by the Court in its instruction to the jury (App. 140a):

> * * * They are "Chinese type drugs", the Court instructs you, if they are typically and principally used by persons of Chinese nationality and are given common acceptance by Chinese people. The term, you understand,

> refers to herbs and other natural products which have a history of use in China and which are native to that country.

As shown in the statement, *supra*, pp. 5–6, the class of products covered by the category "Chinese type drugs" was well understood by merchants and others in the Chinese community to prohibit importation of drugs and herbs of the type in which petitioners were dealing. The application of the statute to the merchandise imported by the petitioners appears to have been clear to them as is indicated by the secrecy—aliases, false-fronted trucks, fictitious names—with which they conducted their operations. The jury was charged that a finding of guilt required a knowing violation of the rules governing transactions with respect to Chinese type drugs, and so found. Commenting on the evidence, the court of appeals stated (Pet. App. 7a):

> From the proof, it is quite evident that Chinese people, including these appellants, and anyone else interested in dealing in such commodities, well knew the meaning of the term "Chinese-type drugs" when it appeared in the Regulation. Obviously the appellants knew what these words meant when advised of the charge in the indictment.

Under the circumstances, the term "Drugs, Chinese type," as used in Section 500.204(a)(2), falls well within the rule that a statute or regulation employing words or phrases having a technical or other special meaning well enough known to enable those within its reach to apply them correctly is valid. *Connally*

v. *General Construction Co.*, 269 U.S. 385, 391; *McGowan* v. *Maryland*, 366 U.S. 420, 428–429. See also *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348; *Naumu* v. *Territory of Hawaii*, 273 F. 2d 568 (C.A. 9). The holding of the court in *McGowan* is a complete answer to petitioners' contentions here. There it was charged that provisions of a Maryland statute describing articles which could be sold on Sunday were unconstitutionally vague. The court rejected this contention and affirmed a criminal conviction for violation of the law, stating (366 U.S. at 428):

> * * * We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. * * *

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1962.

APPENDIX

Section 5, Title 50, Appendix, United States Code (Trading with the Enemy Act) (40 Stat. 415, as amended), provides in pertinent part:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; * * * and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision,

* * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

(3) * * * Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *

Section 500.204, Title 31, Code of Federal Regulations (1962 Supp.), provides in pertinent part:

§ 500.204 *Importation of and dealings in certain merchandise.* (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is:

(1) Merchandise the country of origin of which is China (except Formosa) or North Korea. * * *

(2) Merchandise specified in this subparagraph, however processed, unless such merchandise originated in a country named as excepted for that type of merchandise and is imported directly from that country:

Type of merchandise	*Exceptions*
* * * * *	
(ii) All of the following specified types of merchandise:	
* * * * *	
Drugs, Chinese type	None

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No. 285

JOE QUONG, JOE WING WAH and JOE WING FONG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

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PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

THE GOVERNMENT'S STATEMENT OF FACTS.

The Petition for Certiorari questioned the validity of a Treasury Department regulation. The petition contended that the regulation exceeded the authority granted by Congress, and that its language failed sufficiently to state the nature of the subject it sought to prohibit.

In response, the government presents an extensive statement of facts, totally unrelated to the issues raised. The "facts" as stated are largely government counsel's editorial conclusions drawn from a record which, if presented factually, would yield completely different results.

In view of the nature of our Petition, the only significant facts are:

(a) That petitioners were convicted under the regulation which they attack here;

(b) That the record not only fails to supply, but in fact demonstrates the futility of attempting to find a definition of the terms employed in the regulation.

Accordingly, the government's statement of facts may be regarded as beside the point. We cannot but note with distress, however, a repetition in this Court of a type of presentation which has deflected courts below from a consideration of the significant issues. It would be inappropriate here to dissect and correct the government's statement line by laborious line. On the ultimate briefing of the case, we will, of course, supply a proper factual context. We aver that for present purposes, the relevant facts are fully and fairly stated in the Petition.

ARGUMENT.

The government advances two reasons why your Honors should deny certiorari. Neither suggests the absence of a substantial federal question or the lack of an area of broad concern relative to the federal government *vis a vis* those subject to its jurisdiction. Nor does the government contend, nor could it, that any of this Court's opinions are dispositive of the matters presented in the Petition.

I.

The Government Argues That the Power to Investigate Is the Power to Prohibit.

We complain that the Congress authorized the President to prohibit only transactions in property exhibiting a foreign interest, whereas the regulation prohibits transactions regardless of foreign interest (Ptn. 8-16).

The government admits that the Congress authorized the President to prohibit only those ". . . transactions involving, any property in which any foreign country or a national thereof has any interest . . ." (G. Br. 7). But the government urges that the Congress also authorized the President to *obtain information*

> "'. . . as may otherwise be necessary to enforce the provisions of this [subsection]'" (G. Br. 7).

From this the government concludes that the President can do absolutely anything he wishes to do in order to enforce the subsection so long as the subject of his prohibition lies within the scope of his power to investigate (G. Br. 8-10).

The government arrives at this startling and dangerous conclusion on the theory that given a power to prohibit, and given a broader power to investigate, the power to prohibit necessarily extends to the outer limits of the power of investigation.

The government has thereby offered to your Honors a stunning example of the "enforcement techniques" urged as proper by the government. No more eloquent demand could be made for the Court's regulatory intervention in this case, than that contained within the government's stated reasons for opposing such review.

II.

The Government's Position Relative to the Words "Chinese Type Drugs".

The government's second argument is necessarily distinct from its first, because the grounds urged in our Petition are in no sense interdependent.

The government argues that the words "Chinese type drugs" are meaningful to the "Limited class" sought to be affected.

But if the term "Chinese type drugs" be regarded as a specialized term of art familiar to those conversant with the art, surely a witness versed in that art could have been called to the stand to define the term. This was not done.

In fact the very opposite was done. For Chief Enforcer Minskoff testified without contradiction that the words "Chinese type drugs" were not words of art:

> "It is not a word in art, sir. It is just words we use in everyday language. Chinese type means Chinese type" (App. Appx. 31a).

The judge eschewed a "words of art" theory. He told the jury that Chinese type drugs were items which were ". . . so considered by the public." (App. Appx. 100a)

The government now wishes to see the conviction affirmed by arguing that the term has a specialized meaning to people in the import business. In short, the government will argue from whatever position most conveniently contributes to petitioners' imprisonment. This too, we take it, is part of the "enforcement technique" theory of statutory construction.

Chief Enforcer Minskoff testified that the words "Chinese type" were used as an *enforcement technique* (App. Appx. 29a-30a). Thus the "words of art" were never until now pretended by the government to be words of the *importer's* art, but were represented to be words of the *prosecutor's* art, just as the word "bewitched" was exclusively a term of the inquisitors' art, and no part of the specialized lexicon of the defendant astronomer.

The words "Chinese type" were not words of ordinary commercial knowledge. The word "type" was employed in furtherance of an "enforcement technique". It was a prosecutor's word. Accordingly, one could not go to another person ordinarily engaged in commerce in "Chinese-type drugs." There was no such commerce, except in the head of the Enforcer. (See government expert Chu Fong Ng's testimony that whether or not something constituted "Chinese type drugs", depended upon the decision of Chief Enforcer Minskoff. App. Appx. 104a.)

The government contends that *McGowan* v. *Maryland*, 366 U.S. 420, 428-429 controls. In *McGowan*, a Maryland statute prohibited Sunday sales, excepting merchandise customarily sold at bathing beaches. This Court held that affected persons could know what it was lawful to sell, either as a matter of ordinary commercial knowledge or by making a reasonable investigation at the nearby beach (*McGowan*, 366 U.S. at 428).

The government takes the position that *McGowan* relieves the authors of punitive regulations, of all obligation to use understandable terms. *McGowan* means, according to the government, that it is up to the regulated to find out what the regulator meant, regardless how impractical an investigation might be.

The government reasons: If McGowan must inquire at the local beach, it follows that Quong must inquire in China.

Nothing less will suffice. True, Quong inquired in Washington—but to no avail. All he learned there was that "We know of no published or commonly accepted definition of the term 'Chinese-type' drugs." (App. Appx. 103a).

The definition of the term, if it exists, has thus far eluded the enforcers as well as the courts. To say that the term is meaningful to petitioners, is sheer sophistry, based on nothing more than the fact that petitioners have Chinese-sounding names.

The vagueness of the language in the regulation is such that:

a. Department Alpha of a governmental branch reads a regulation, concludes that certain merchandise properly can be admitted, levies and collects customs duties, and permits the introduction of that merchandise into the interior commerce of the United States:

Then—

b. Department Beta of the *same* branch of the government interprets the *same* regulation as justifying the seizure of that very *same* "lawfully imported" merchandise as contraband and further justifies imprisonment of its importers for having "unlawfully" imported similar merchandise, all on the theory that all merchandise *of that type* is absolutely prohibited entry. (App. Appx. 91a, 92a-93a, 104a,, 112a, 123a).

Another branch of the same government advises that it is unaware of any commonly accepted definition. (App. Appx. 103a).

Yet another branch assures this Court that the "... term is not confusing." (Gov't. Br. 8).

CONCLUSION.

For the reasons stated in our Petition and in this Reply, and for the reasons stated in the government's Brief in Opposition, we respectfully urge that certiorari be granted herein.

Respectfully submitted,

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